No. 17-50762

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

City of El Cenizo, Texas; Raul L. Reyes, Mayor, City of El Cenizo; Tom Schmerber, County Sheriff; Mario A. Hernandez, Maverick County Constable PCT. 3-1; League of United Latin American Citizens; Maverick County; City of El Paso, *Plaintiffs-Appellees*,

City of Austin, *Intervenor Plaintiff-Appellee*,

Travis County; Travis County Judge Sarah Eckhardt; and Travis County Sheriff Sally Hernandez, *Intervenor Plaintiffs-Appellees*,

City of Dallas, *Intervenor Plaintiff-Appellee*,

Texas Association of Hispanic County Judges and County Commissioners, *Intervenor Plaintiff-Appellee*,

City of Houston, *Intervenor Plaintiff-Appellee*,

v.

State of Texas; Greg Abbott, Governor of the State of Texas, in his Official Capacity; and Ken Paxton, Texas Attorney General, *Defendants-Appellants*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

PROPOSED BRIEF OF *AMICI CURIAE* THE STATES OF WEST VIRGINIA, LOUISIANA, AND SIX OTHER STATES IN SUPPORT OF APPELLANTS' EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION

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El Paso County; Richard Wiles, Sheriff of El Paso County, in his Official Capacity; and the Texas Organizing Project Education Fund, *Plaintiffs-Appellees*,

v.

State of Texas; Greg Abbott, Governor; Ken Paxton, Attorney General; and Steve McCraw, Director of the Texas Department of Public Safety, *Defendants-Appellants*.

City of San Antonio; Rey A. Saldana, in his Official Capacity as San Antonio City Councilmember; Texas Association of Chicanos in High Education; La Union Del Pueblo Entero, Inc.; and Workers Defense Project, *Plaintiffs-Appellees*,

v.

State of Texas; Ken Paxton, Sued in his Official Capacity as Attorney General of Texas; and Greg Abbott, Sued in his Official Capacity as Governor of the State of Texas, *Defendants-Appellants*.

CERTIFICATE OF INTERESTED PARTIES

Pursuant to the fourth sentence of Fifth Circuit Rule 28.2.1, *amici* States need not furnish a certificate of interested parties because they are government entities.

TABLE OF CONTENTS

Page

INTEREST AND IDENTITY OF *AMICI* 1

INTRODUCTION 2

ARGUMENT 4

I. THE TERM "MATERIALLY LIMITS" IS NOT IMPERMISSIBLY VAGUE 4

II. SB4'S PROHIBITION OF "ENDORSING" POLICIES THAT LIMIT ENFORCEMENT OF IMMIGRATION LAWS DOES NOT VIOLATE THE FIRST AMENDMENT 7

CONCLUSION 13

TABLE OF AUTHORITIES

Cases **Page(s)**

Cafe Erotica of Fla., Inc. v. St. Johns Cty.,
360 F.3d 1274 (11th Cir. 2004) 12
CompuCredit Corp. v. Greenwood,
565 U.S. 95 (2012).....5
Groome Res. Ltd., L.L.C. v. Par. of Jefferson,
234 F.3d 192 (5th Cir. 2000) 5
MacDonald v. City of Chicago,
243 F.3d 1021 (7th Cir. 2001) 5
Moore v. City of Kilgore,
877 F.2d 364 (5th Cir. 1989) 11
Nat'l Org. for Women, Inc. v. Scheidler,
267 F.3d 687 (7th Cir. 2001) 5
Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott,
734 F.3d 406 (5th Cir. 2013) 2
Roark & Hardee LP v. City of Austin,
522 F.3d 533 (5th Cir. 2008) 5
Skilling v. United States,
561 U.S. 358 (2010)..... 6, 7, 8
Turner v. City Council of City of Fredericksburg,
534 F.3d 352 (4th Cir. 2008) 10
United States v. Golding,
332 F.3d 838 (5th Cir. 2003) 9
Virginia v. Am. Booksellers Ass'n, Inc.,
484 U.S. 383 (1988).....8, 9
Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,
135 S.Ct. 2239 (2015).....10
Williams v. Mayor & City Council of Baltimore,
289 U.S. 36 (1933).....3
Yates v. United States,
135 S.Ct. 1074 (2015).....9

TABLE OF AUTHORITIES

(continued)

Statutes **Page(s)**

Senate Bill 4, 2017 Tex. Sess. Law Serv. Ch. 4 ..... 1, 11
Tex. Gov't Code Ann. § 752.053..... 1, 4, 7, 9
U.S. Const. amend. X.....3
U.S. Const. art. VI, cl. 2.....3
U.S. Const. art. VI, cl. 3.....3

Rule

Fed. R. App. P. 29(a) 1

INTEREST AND IDENTITY OF *AMICI*

The States of West Virginia, Louisiana, Alabama, Arkansas, Georgia, Missouri, Oklahoma, and South Carolina file this brief under Federal Rule of Appellate Procedure 29(a).

Amici States have three important interests in the outcome of this litigation. *First*, as the chief legal officers of their States, the undersigned Attorneys General have an interest in complying with federal immigration law and ensuring that the municipalities that exercise the States' power do the same. Texas's Senate Bill 4 ("SB4"), 2017 Tex. Sess. Law Serv. Ch. 4, *codified at* Tex. Gov't Code Ann. § 752.053 *et seq.*, does precisely that by prohibiting local entities and officials from "adopt[ing], enforc[ing], or endors[ing]" policies that prohibit or "materially limit[]" the enforcement of federal immigration laws. *Id.* § 752.053(a)(1).

Second, sanctuary-city policies can harm neighboring States—even those that have no sanctuary jurisdictions—by making it easier for illegal immigrants who commit crimes to evade law enforcement and to travel out-of-state. For example, the City of Baltimore, which has adopted sanctuary-city policies, is a significant source of illegal drugs for West Virginia's eastern panhandle. Sanctuary policies deprive law enforcement in Baltimore and similar jurisdictions of tools that could help prevent out-of-state drug trafficking.

Third, *amici* States have an interest in ensuring that courts follow the strict standards that govern requests to enjoin state laws. *Amici* States take seriously their obligations to comply with the Constitution and federal law, and to protect and legislate in the best interests of their citizens. Courts must defer appropriately to these deliberate judgments, consistent with the presumption of constitutionality of state laws—particularly where, as here, a State proffers reasonable interpretations of the law that would avoid any constitutional concern.

INTRODUCTION

As Texas has shown in its motion, all four criteria for a stay are satisfied here: (1) Texas is likely to succeed on the merits of this appeal; (2) Texas will be irreparably injured without a stay; (3) a stay will not substantially injure the other parties; and (4) a stay will advance the public interest. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013).

The interests of *amici* States described above further illustrate that a stay is in the public's interest. Citizens of Texas—and all States—have an interest in ensuring that their local officials adhere to the law, as well as an interest in reducing crime and other negative effects sanctuary-city policies can have on neighboring States. Moreover, the standards governing pre-enforcement facial challenges to state laws make Texas very likely to prevail on this appeal. Specifically, this brief focuses on two arguments. *First*, as used in SB4, the term "materially limits" is not

unconstitutionally vague. *Second*, SB4's prohibition on "endorsing" policies that limit immigration-law enforcement does not violate local officials' free-speech rights.

The key issues in this case are whether a State may enforce a public-protection law that is susceptible to a construction that avoids constitutional concerns, and whether a State can ensure that the exercise of its power—and by extension the power it delegates to its political subunits—complies with the United States Constitution. Undoubtedly it may do both. States have a duty to follow federal law, U.S. Const. art. VI, cl. 2, and state officers take an oath to uphold the federal Constitution, U.S. Const. art. VI, cl. 3. Complying with this oath requires yielding to federal law when it conflicts with state policies and laws. And because all governmental power that does not belong to the federal government belongs to the States, U.S. Const. amend. X, any power a State delegates to a political subdivision like an administrative agency or municipality ultimately belongs to the State. *See*, *e.g.*, *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, *created by a state for the better ordering of government*, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." (emphasis added)).

Together, these principles make clear the importance of laws like SB4, which the Texas Legislature reasonably found necessary to protect its citizens and to ensure that its municipalities exercise Texas's power consistently with federal law. Nothing in SB4 violates the Due Process Clause or the First Amendment. The term "materially limits" provides sufficient notice of SB4's prohibitions, as shown by numerous cases upholding statutes with similar language. Similarly, SB4's prohibition of "endorsing" policies that limit federal immigration laws encompasses only *official* actions, not local officials' personal speech, and thus does not violate individual free-speech rights. On the other hand, failing to credit Texas's interpretation of SB4 to avoid plaintiffs' specter of unconstitutionality violates the standards governing pre-enforcement challenges, and impermissibly supplants the judgment of the Texas Legislature about the best way to fulfill its duties to Texans and to the rule of law.

ARGUMENT

I. THE TERM "MATERIALLY LIMITS" IS NOT IMPERMISSIBLY VAGUE.

Texas is likely to prevail on its argument that SB4's prohibition on "materially limit[ing]" local officials' cooperation with federal law enforcement, §§ 752.053(a)-(b), is not unconstitutionally vague.

A. Any ambiguity in the term "materially limits" does not invite arbitrary enforcement. This Court has rejected the notion that a statute "must delineate the

exact actions [one] would have to take to avoid liability," holding instead that "[o]nly a *reasonable degree of certainty* is required." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 552-53 (5th Cir. 2008) (citations omitted; second alteration and emphasis in original). Statutory terms need not be perfectly precise; indeed, when legislatures design statutes to be "concise and comprehensible to the layman," the effect is that their language is "necessarily . . . imprecise." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 102 (2012). That imprecision is not fatal, and the district court was wrong to conclude otherwise here.

Texas is correct that far from setting forth an "inscrutable standard," Order 59, the term "materially limits" has a "clear, core meaning." Emergency Mot. to Stay Preliminary Injunction Pending Appeal (Sept. 5, 2017) 16. The descriptor "material"—neither plaintiffs nor the district court expressed concern with the meaning of "limits"—is common in state and federal law, and commonly upheld. Indeed, "[m]any criminal statutes contain key terms such as the word 'material' which are somewhat imprecise but have never been considered void for vagueness." *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 706 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003). Similar terms like "substantially," "unnecessarily," and "sufficient" have survived constitutional challenges, *e.g.*, *MacDonald v. City of Chicago*, 243 F.3d 1021, 1028 (7th Cir. 2001), as has the term "reasonable," *e.g.*,

Groome Res. Ltd., L.L.C. v. Par. of Jefferson, 234 F.3d 192, 217 (5th Cir. 2000). The district court rejected a vagueness challenge to *other* language in SB4 because it "has a settled legal meaning in other contexts," Order 60 ("pattern or practice"); "materially limits" withstands constitutional scrutiny for similar reasons.

B. States, of course, may not legislate contrary to the Constitution, but they do have the prerogative to regulate within its limits—and a duty to ensure that their political subunits comply with federal law. The district court's analysis unduly constrains States' authority to act in this area by second-guessing Texas's deliberate judgment that SB4 is necessary to protect its citizens and uphold the law.

The district court's discussion of plaintiffs' standing to raise a vagueness claim highlights these troubling implications. The court credited plaintiffs' argument that SB4's alleged vagueness puts them "in a bind," forcing them either to violate SB4, or to go beyond what SB4 requires and potentially violate the Fourth Amendment by "wrongfully carrying out ICE detainer requests not required by SB4." Order 53-54. But this dichotomy ignores the perfectly reasonable middle ground: plaintiffs can cooperate with ICE requests within the law's bounds, in the same way that state actors must *always* act consistently with state and federal law. Whatever the breadth of "materially limits," it cannot reasonably be construed to force municipalities to break the law. Indeed, the doctrine of constitutional avoidance would prohibit any

such construction. *Skilling v. United States*, 561 U.S. 358, 406 (2010) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (citation omitted)).

While plaintiffs' position may reflect skepticism of the legality of federal immigration laws, plaintiffs have not challenged those laws here. The district court credited plaintiffs' argument that they are harmed because SB4's purportedly "vague" language requires them to obey immigration laws with which *they* disagree, but their position is instead an attempt to sidestep the *State's* duty to ensure compliance with federal law. By enjoining Texas's law in its entirety, the district court bypassed the primary role of the States in upholding the rule of law and protecting their citizens.

II. SB4'S PROHIBITION OF "ENDORSING" POLICIES THAT LIMIT ENFORCEMENT OF IMMIGRATION LAWS DOES NOT VIOLATE THE FIRST AMENDMENT.

Texas will likely prevail on its argument that the term "endorse" in SB4 does not regulate protected speech. SB4 provides that local entities may not "adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws." § 752.053(a)(1). Accepting plaintiffs' argument that the term "endorse" could include unconstitutional applications, such as local officials' campaign positions on immigration policy, the district court enjoined the entire statutory provision. This was error. Under relevant canons of

interpretation, "endorse" is best read to mean "authorize or permit"—that is, officially sanctioning policies that limit immigration laws. Under that interpretation, "endorse" covers only State-authorized conduct, and thus does not violate the First Amendment.

A. The term "endorse" is susceptible to an interpretation that fits squarely within the First Amendment. As Texas has argued, "endorse" most fairly means "to sanction," which in turn means "to authorize or permit; countenance." Mot. 15 (citations omitted). This definition covers acts taken in a local official's *official capacity*, not his or her personal views on immigration policy. This erases the district court's concerns that "endorse" could encompass statements an officer makes to the public or press. *See* Order 41.

Texas's interpretation is consistent with the canon that courts must employ "*every reasonable construction*" of the text "to save a statute from unconstitutionality." *Skilling*, 561 U.S. at 406 (citation omitted; emphasis in original). Even under the First Amendment's heightened protections for speech rights, a law must only be "'readily susceptible' to a narrowing construction that would make it constitutional" to survive a facial challenge. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (citations omitted). The district court ignored these principles and Texas's reading of SB4.

Texas's construction also comports with *noscitur a sociis*, which provides that courts should interpret terms "by reference to the words associated with them in the statute." *United States v. Golding*, 332 F.3d 838, 844 (5th Cir. 2003) (citation omitted). SB4 provides that local entities may not "adopt, enforce, or endorse" policies that limit enforcement of immigration laws. § 752.053(a)(1). The word "adopt" means "to take up and practice or use" or "to accept formally and put into effect." *Adopt*, Merriam-Webster, https://www.merriam-webster.com/dictionary/adopt. "Enforce" means "to give force to" or "to carry out effectively." *Enforce*, Merriam-Webster, https://www.merriam-webster.com/dictionary/enforce. In light of these neighboring terms, it is at least "reasonable" to interpret "endorse" as another way a locality may effectuate a policy or practice—and not as a limitation on an official's speech rights.

Similarly, the canon of *ejusdem generis* counsels in favor of Texas's construction. "Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 135 S.Ct. 1074, 1086 (2015) (citation omitted; alteration in original). Thus, even if

elsewhere "endorse" carries the broad meaning the district court gave it, in *this* statute, the more-circumscribed terms "adopt" and "enforce" keep it in the realm of official authorization.

B. When read to encompass only official acts, "endorse" refers to conduct carrying the imprimatur of the municipality, and by extension, the State. Even if this official conduct could be described as speech, "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2245 (2015); *see also id.* at 2245-46 ("[G]overnment statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment . . . ." (citation omitted)). Likewise, a State may speak through municipalities' officers, and it may control the content of that speech, even against a First Amendment challenge. *See Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008) (holding legislative prayer to be unprotected state speech and upholding content-based restrictions on city councilman's prayers).

The district court rejected Texas's position in part because it held that Texas was acting as "the sovereign and not the employer" when it enacted SB4, which requires "a more demanding level of scrutiny." Order 34 n.41. But here, Texas is

regulating not the public's speech, but its own official acts, albeit through local employees and officials who derive their power from the State. The district court thus created a false dichotomy; Texas will likely succeed on this claim when SB4 is understood as regulating only the acts of the State and its political sub-entities.

C. Even if the term "endorse" violated the First Amendment—and it does not—at a minimum, the district court erred in enjoining the entire provision instead of severing the offending word. It is undisputed that the terms "adopt" and "enforce" do not raise First Amendment concerns. It is also undisputed that SB4 contains a severability clause, SB4 § 7.01, which makes plain the Texas Legislature's intent that the rest of the law stand even if certain language is deemed unconstitutional. As Texas demonstrates, there is no legal barrier to applying that clause as the Texas Legislature directed. Mot. 15-16.

Where, as here, a challenged word can be removed to correct a constitutional defect, deep-seated principles of federalism and comity require allowing the rest of a statute to stand, rather than erasing the rest of the State's legislative judgments. *See Moore v. City of Kilgore*, 877 F.2d 364, 382 (5th Cir. 1989) (holding that decisions not to sever statutory provisions usually involve considerations "that, given the nature and range of the act's invalidity, the lawmaker . . . would not want the severed

statute to stand, or for federalist reasons, a federal court should not sever the statute"); *Cafe Erotica of Fla., Inc. v. St. Johns Cty.*, 360 F.3d 1274, 1292 (11th Cir. 2004) ("The interests of federalism and comity dictate conservatism to federal courts in imposing their interpretative views on state statutes." (citation omitted)).

Texas thus has a strong likelihood of success against plaintiffs' First Amendment challenge.

CONCLUSION

The district court's order should be stayed pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on September 19, 2017, the foregoing document was served on the counsel of record for all parties through the CM/ECF system.

/s/ Thomas M. Johnson, Jr. September 19, 2017
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